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# Supreme Court of the United States

**October Term, 1949.**

No. 163. **163**

COMMODITIES TRADING CORPORATION, *et al.*,
*Plaintiffs in Error,*

vs.

THE UNITED STATES,
*Defendant in Error.*

No. 156. **156**

THE UNITED STATES,
*Plaintiff in Error,*

vs.

COMMODITIES TRADING CORPORATION, *et al.*,
*Defendants in Error.*

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

**Reply Brief for Commodities Trading Corporation, et al., Plaintiffs Below, and Plaintiffs in Error in No. 163 and Defendants in Error in No. 156.**

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# INDEX.


| | PAGE |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Facts | |
| Facts | 5 |
| Summary of Argument | 15 |
| First Point.—While Commodities believes that general well-established rules for determining "just compensation" entitle it to all that it asked in its complaint, it considers that the general equities are nevertheless the strongest basis upon which to present its case, and accepts the challenge made in the Government's Point I | 19 |
| Second Point.—Commodities had the right and the opportunity, despite all Government restrictions, including 6½¢ ceiling price, of disposing of its pepper at the time of requisition for compensation far in excess of the ceiling price or of holding its property until the end of price control and of disposing of it for an even greater price. In such circumstances, the ceiling price is not even relevant | 29 |
| Third Point.—The decision of this Court in United States v. New River Collieries Company, supra, is decisive upon the point that an established ceiling price does not measure "just compensation" where the owner of the property requisitioned can lawfully sell for more | 31 |

PAGE

FOURTH POINT.—The sales of pepper at ceiling prices in December 1941 and in 1942 furnish no basis for determining market value or just compensation for pepper requisitioned on May 26, 1944 ..... 34

FIFTH POINT.—The contention of the Government that Commodities should have attacked the ceiling price and have had its claim heard before the Emergency Court of Appeals and that not having done so is estopped, is without support in law, would be most unfair to persons whose property was requisitioned, and would be most disastrous to orderly and reasonable price fixing ..... 38

SIXTH POINT.—No disastrous consequences would result from permitting a court rather than O. P. A. to fix just compensation ..... 41

SEVENTH POINT.—Plaintiff's claim does not include any element of increase in price due to the need of the Government or even due to our War ... 45

EIGHTH POINT.—Commodities is entitled, as a minimum, to the value which its pepper would have had in May 1944, if there had been no War .... 47

NINTH POINT.—The ceiling price for imitation pepper furnishes a measure of the value of Commodities pepper ..... 48

TENTH POINT.—The other opportunities to sell at far above the 6½ cent price destroy the force of that ceiling and furnish an additional measure of the value of Commodities pepper ..... 54

PAGE

ELEVENTH POINT.—Commodities Pepper had a retention value in excess of 22¢ a pound which should have been allowed in finding just compensation ..... 56

TWELFTH POINT.—Commodities' sales at 10 cents, subsequent to October, 1944, and its negotiations to sell to the Army for 9¾ cents were not relevant, and should not be considered in determining the value of Commodities' Pepper in May 1944 ..... 61

THIRTEENTH POINT.—Findings of the Court of Claims support an award far in excess of the 15 cents per pound allowed and in excess of the 22 cents per pound demanded in the complaint 64

CONCLUSION ..... 68

## CASES CITED

PAGE

City of Los Angeles v. Pomeroy, 124 Cal. 597 .... 58
Commodities Trading Corp. v. Federal Surplus Commodities Corp., Civil Action No. 23573, U. S. D. C. D. C. ..... 11, 21, 53, 63
Commodities Trading Corporation v. United States, C. Cls. Nos. 57587 and 57588 ..... 43
Commodities Trading Corp. v. U. S., 83 F. Supp. 356 1
Cudahy Bros. Co. v. United States, 155 F. 2d 905 .. 37
Graves v. United States, 62 F. Supp. 231 ..... 37
Kaiser v. U. S. 69 F. Supp. 588 ..... 60

PAGE

Lessner Plumbing & Heating Co. v. United States, 64 F. Supp. 931 ..... 37
Louisville Flying Service v. United States, 64 F. Supp. 938 ..... 37

Madison Park Corp. v. Bowles, 140 F. (2) 316 ..... 39
Matter of Board of Water Supply, 209 A. D. 213 N. Y. ..... 58
Matter of People of New York etc., 81 Misc. 324 (N. Y.) ..... 58
Monongahela Navigation Co. v. United States, 148 U. S. 312 ..... 30

Pantex Pressing Machine Co. v. U. S. 71 F. Supp. 859 ..... 60

Seaboard Air Line Ry. v. United States, 261 U. S. 299 ..... 30

Tyson Creek v. Empire, 31 Idaho 580 ..... 58

United States v. Cors, 337 U. S. 325 ..... 16
United States v. Felin & Co., 334 U. S. 624 ..... 16, 30
United States v. Miller, 317 U. S. 369 ..... 30
United States v. New River Colleries Co., 262 U. S. 341 ..... 30, 31
United States v. Toronto, Hamilton and Buffalo Navig. Co., This Term, No. 39, decided December 12, 1949 ..... 15, 16, 35

L. Vogelstein & Co. v. United States, 262 U. S. 337 .. 37

Yakus v. United States, 321 U. S. 414 ..... 7

## Constitutions and Statutes.

PAGE

Constitution of the United States: Fifth Amendment ..... 42
Emergency Price Control Act, Act of January 30, 1942, ch. 26, 56 Stat. 23, 50 U. S. C. App. 901, 902 (a), 904 (d), 923, 924, 924 (d) ..... 5, 40
Requisitioning Act (Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by Act of March 27, 1942, c. 199, 56 Stat. 181, and the Act of June 30, 1943, c. 181, 57 Stat. 271) .....5, 40, 43

## Miscellaneous.

Food Distribution Order 19 ..... 55
Peire Schedule No. 52, issued December 11, 1941 .. 55
Revised Price Schedule No. 52, as effective on May 26, 1944 ..... 15

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## Opinion Below.

The opinion of the Court of Cairns is reported at 113 C. Cls. 244.

## Jurisdiction.

The judgment of the Court of Claims was entered on April 4, 1949. The petition for a writ of certiorari in No. 156 was filed on July 1, 1949, and the cross-petition for

writ of certiorari in No. 163 was filed on July 5, 1949. Certiorari was granted in both cases on October 24, 1949 (R. 138-139). The jurisdiction of this Court rests upon 28 U. S. C. 1255.

## Questions Presented.

The Solicitor-General's statement of the questions presented differs radically from Commodities' view thereof.

The lawful ceiling price referred to was the ceiling price which was fixed more than two years prior to the taking here in question and the substantial trading which took place at that ceiling price was not ordinary mercantile trading but was the selling out of importers, who had a 6½ cent ceiling, to packers and grinders, who had a 12½ cent ceiling, because said importers were not strong financially and were scared out by the ceiling price and governmental action hostile to the holders of pepper (O.P.A. Price Reg. 52, Spec. Fdg. 15, R. 18, 89-90, 108-109).

This selling quickly dried up, and for many months prior to May 26th, 1944, the date of requisition, there had been no sales whatever (Spec. Fdgs. 14, 19, R. 18, 19). Between the time of said so-called substantial trading and the date of requisition, conditions had changed completely. At the date of fixation of the ceiling price there was a three-year supply of pepper in the United States and more pepper was coming in freely, in fact, was being dumped on the New York market (Spec. Fdg. 8, R. 15, 108). But shortly thereafter, the pepper supplies from Sumatra, which usually supplied the United States, were cut off by the Japanese military successes and supplies from India, where there were large quantities exportable to the United States, were cut off by the action of O.P.A. (R. 46, 102, Spec. Fdg. 23, R. 21) and by May 1944, there was a dearth of pepper throughout the whole world, including the United States, despite the fact that sales of pepper had been rationed and had finally been brought

down to 40% of normal prewar business (R. 41, 44, Spec. Fdg. 13, R. 17-18).

All of the above facts must be included in any fair statement of the question presented. Moreover, the retention value referred to by the Solicitor-General did not include scarcity value caused by wartime shortages, nor a speculative value, but was the value after the elimination of wartime shortages, and was based on factors that were definite and known and had taken place before the beginning of the War (Spec. Fdgs. 25, 26, R. 22-23, 45, 98-99, 100-102, 107).

The fundamental questions presented as Commodities sees them are as follows:

1. Do sales at ceiling prices many months before the date of a requisition furnish any basis for market value in cases where conditions had changed completely between the time of sales and the time of requisition?

2. Should any weight be accorded to a ceiling price for a commodity not produced in the United States in determining just compensation for property requisitioned when the evidence all showed that the said ceiling price was completely out of line with prices everywhere in the world outside of the United States and where the entire trade objected to said prices and importuned O.P.A. to increase them, and where O.P.A., itself, found that a 60% increase could be made without increasing the cost of the commodity to the consuming public as such increase in the basic price could well be, and should be, absorbed by the middleman.

3. In the case of the requisitioning of a Commodity, for which a general ceiling price has been fixed, is not the force or effect which might otherwise result from such ceiling price completely destroyed by the fact that the

holders of said commodity could lawfully sell currently at much higher prices than said ceiling prices, by changing the form of their property or by adopting a slightly different method of disposing thereof.

4. Where a commodity is not perishable and is easily and cheaply stored, is not the right of the owner to hold his property until the end of price control and obtain a price therefore which was inevitably several times the ceiling price, a substantial and valuable right which gave a value to the property at the time of taking far in excess of the ceiling price?

5. Does not the cost of property which is requisitioned constitute a measure of value where there is no market and where other measures of value are lacking or difficult of application and may there not be included in said cost, the value of the services of the owners gatuitously furnished?

6. Can just compensation of property requisitioned which has a high value throughout all the world, partly due to the destruction of War, be less than the fair market price that said property would have commanded at the time of requisition, had there been no War?

7. In a case of a requisition of black pepper, does not the current market price in British India of 21¢ per pound furnish the best measure of value where the Department of Agriculture had arranged with the Allied Food Board to allocate 20,000,000 pounds of whole black pepper to the United States, and where such importation was prevented only by the refusal of O.P. A. to permit the same, and where there was an urgent demand in the United States and the increased cost to the users over the ceiling price would be negligible, and where such Indian price was

moderate and even low in comparison with the ceiling prices which had been fixed by O.P.A. for other spices?

8. Can increase in value due to War, but not to Government demand be lawfully excluded in determining just compensation?

9. Do not the Emergency Control Act and the Act of October 16, 1941, both separately and taken together, clearly indicate that it was the Congressional intent that ceiling prices fixed by the O.P.A. should not be taken as the measure of just compensation?

## Facts.

The brief of the Government is generally unfair in its Statement of Facts and is in direct conflict with the undisputed evidence at many points, including the following:

The statement of the counsel for the Government that the pepper which was taken by the Army under the requisition here in question was high priced pepper which had been deliberately selected for it by Commodities to make the cost of the requisitioned property high (Br. 21-22) is not only without one word of support in the record, but is in flat contradiction of the plain and direct testimony.

The Witness, Corbitt, an accountant employed by a firm of Certified Public Accountants, who supervised the accounts of Commodities, testified that the 14.59¢ average cost to the company of the pepper seized was also the average cost of all of the pepper owned by Commodities at that time (R. 93).

The agreement between the average price of all the pepper owned by Commodities and that taken by the Army was due to the fact that Commodities selected bags for the Army to take "so that we would get an average cost, or as near an average cost as we could, so that

there would be no question as to whether this was high-priced or low-priced pepper" (R. 94, 95).

The Attorney-General further accuses Commodities of having selected pepper which had been longest on storage in order to inflate further the cost of the requisitioned pepper (Br. 100). This also is wholly unfounded and impossible in view of the above testimony. The 14.59 cent cost figure included storage, interest and other overheads, so that the cost of the requisitioned pepper and the cost of the pepper retained by Commodities were on the same basis, and the average total cost of each was the same including storage and other overheads (R. 92, 93).

The development of the Government's argument on the above points is interesting. It has been careful throughout its brief to give references with regard to practically every statement which it has made, but pages 21 and 22, where the above charges were first made, contains no reference to the evidence whatever. At page 100, its charge that Commodities itself selected the high price pepper for the Government to take, contains a reference: "*supra*, pp. 58, 61-63", but looking back at those pages, it will be found that there is no reference whatever in the record in support of any such alleged manipulation. The only reference to this general subject is the letter of the Price Administrator finding an average price for Commodities' pepper, including storage, interest, insurance and many other overheads of 5½¢ on an alleged first in—first out basis.* As shown in Commodities' Main Brief, pages 58 and 59, the actual cost, without numerous overheads, was 14.59 cents, and the cost found by the Court of Claims was 12.7 cents, but stating the omission of many important overheads.

The Government's Brief (p. 57), states as follows:

> "3. *The administrative determination of the fairness of the ceiling price as applied to Commodi-*

*This statement of method used was not in accord with the facts.

*ties.*—In addition to the proof afforded by the large-scale trading in pepper at the ceiling price, there was, in March 1944, an express administrative determination that the established maximum was not only fair and equitable in general, but also fair and equitable to Commodities. On October 4, 1943, the first formal challenge against the pepper price ceilings was filed, and it was by Commodities" (R. 35-37).

* * * * * *

"(a) The Price Administrator denied Commodities' request because he found that, even without that additional provision, the ceiling price allowed Commodities a profit substantially in excess of the normal profit in the trade (R. 36-37). He also specifically determined that the general price ceiling should in all fairness be applied to Commodities" (R. 37).

This denial was in the form of a letter.

In the letter O.P.A. found a cost price to Commodities of 5½ cents per pound. The Accountants of Commodities found a cost of 14.59 cents, omitting some overheads (R. 92, 93), and the Court of Claims found a cost of 12.7 cents per pound, omitting many overheads (Spec. Fdg. 24, R. 21-22).

Following the above statement the Solicitor-General has throughout his brief referred to the administrative determination of the fairness of the ciling price.

There is no support whatever for these statements. Commodities never attacked the ceiling price. It knew better. With all of the obstacles to a fair trial pointed out in the opinion of Mr. Justice Roberts in the *Yakus* case, 321 U. S. 411 at pp. 454-459 and with the burden upon it of proving not only that the ceiling was too low but also that the action of the Administrator had been capricious or

arbitrary and having such burden in time of War it knew it had little chance of knocking out the ceiling price. Besides it did not wish to. What it did was to address a petition to O.P.A. asking a modification making an allowance for storage. O.P.A. denied the petition by a letter dated March 11th, 1944 (Def.'s Ex. 3, R. 36). There had been no trial or hearing. No foundation for the letter whatsoever was proven, and it was a deliberate distortion of the facts.

When the paper was offered in evidence (R. 121), Commodities objected (R. 121-122). It was received over Commodities' objection and exception (R. 122).

The fact that Commodities' application to O.P.A. was denied was found by the Court of Claims, but it refused to find the facts stated in the letter (Spec. Fdg. 21, R. 19-20).

There was no support whatever for any of the facts stated in the letter and it has no proper place in the discussion of the evidence. It was presented by the only witness called by the government, Mr. Squires, the former Chief of the Spice Section of O.P.A. (R. 35). This gentleman had been a coffee merchant in New Orleans up to the time of his appointment to O.P.A. (R. 34). There is no testimony to show who produced the figures or that any competent accountant advocated the so-called "first in—first out" method, which was stated in the letter to have been used by O.P.A. However, the statement that the accounting was taken on that basis was false and was shown so to be by the cross-examination of Squires (R. 110-111).

The "first in—first out" theory, as this Court doubtless knows, is sometimes employed in Income Tax accounting, where there are masses of merchandise of a homogeneous kind, from which sales have been made from time to time at different price levels, and where the merchandise itself was acquired at different price levels. In

such case, the first sales are considered as having been made with respect to the first quantities purchased because of the difficulty of proceeding on any exact basis. This procedure had no proper application to the determination of Commodities' costs as it had a complete record of every separate lot which it had purchased, with the cost, and date of purchase, together with a record of the quantity and selling price of each parcel sold and the particular lot from which it had been withdrawn (R. 93).

Moreover the said Government witness, Squires, admitted the accuracy of Commodities' accounts, kept under the direction of a firm of C.P.A.'s which showed a cost of 14.59 cents per pound, without the inclusion of some important overheads, and explained that his result of approximately 5½ cents a pound was because of a different method of accounting (R. 110, 92, 93, Deft.'s Ex. 3, R. 36).

On cross-examination, Squires testified that what O.P.A. actually did was not to consider sales at all, but to start with the last purchase which had been made by Commodities, and keep on including and adding purchases until they obtained the amount of 19 million 545 thousand pounds, which was the amount of pepper that Commodities had at the outbreak of the War (R. 110-111). He divided the total payments therefor by those pounds and got 5½¢. He admitted that by this method he included only the purchases which had taken place after September 1936 (R. 111) and excluded all carrying charges back of that date (R. 111). His method was not sustained by any testimony and is clearly improper. Its use was obviously an intentional distortion to get a low price for Commodities' pepper.

The proof is that for the four-year period preceding the outbreak of the war, Commodities was not accumulating pepper, but was a heavy seller, having sold 8 million pounds on balance during this period (Spec. Fdg. 5, R. 13-14). Everyone of normal intelligence knows, and a

coffee merchant should have known, that one does not dispose of 8 million pounds of a small commodity like pepper by selling consistently and never buying. This would inform the entire trade of what he was doing, and would lead to low prices paid by purchasers, based on that knowledge.

Any intelligent trader, who wishes to dispose of a large quantity of anything—stocks or bonds or commodities—buys as well as sells, but sells on balance. Consequently, the purchases which Mr. Squires took were obviously, for the most part, only purchases made to screen the sales. But the admitted fact is that by the method used, Squires found that all of Commodities' purchases were made between Pearl Harbor Day and the middle of 1936, working back, although Commodities had actually reduced its inventory by about 8 million pounds during that period (Spec. Fdg. 5, R. 13-14).

The reason why a distorted method of this kind was used was that it contained only low cost pepper purchased subsequent to 1936 and excluded all of the much higher cost pepper purchased prior to 1936 (see graph R. 16 and R. 111). Moreover, as above stated, said price included only the storage charges that would have been applicable to recent purchases held for short periods, and omitted entirely the storage and other carrying charges on pepper which had been bought in 1933 and 1934, and was still on hand, upon which storage charges had been paid every month (R. 111, Spec. Fdg. 24, R. 21-22). By this method O.P.A. obtained and published a 5½¢ price including interest, storage and other overheads in the face of the admittedly correct figure of 14.59¢ testified to by Commodities' accountants and a 12.56¢ price found by the Court of Claims omitting important overheads (Deft.'s Ex. 3, R. 36, R. 92, 93, 110, 111, Spec. Fdg. 24, R. 21).

It was more than a coincidence that this letter (Deft.'s Ex. 3, R. 36-37) denying Commodities' application for an

increase in the ceiling price, was not made until nearly five months after the application had been filed, and was then issued practically simultaneously with the attempt to requisition practically all of the pepper in the country which attempt Commodities defeated *in toto*.*

It is characteristic of the fairness of the Government's brief that this letter is referred to repeatedly as an "Administrative Determination" of the fairness of the O.P.A. ceiling price and of the fairness of that price to Commodities.

Again, at page 100, the Government states that Commodities "adopted the policy of retaining its high-cost pepper as long as possible, disposing first of the lower-cost stocks".

The statement of counsel continues that this practice was indulged in to inflate the cost of the pepper seized by the Government.

The above statement is wholly unsupported and is ridiculous, in view of the undisputed facts found by the Court of Claims. Commodities sold no pepper willingly, and practically no pepper at all subsequent to Pearl Harbor Day and prior to the requisition here in question (Spec. Fdgs. 5, 8 and 14, R. 13-14, 15, 18).

The only time, therefore, that Commodities could have indulged in the practice charged by the Government, would have been prior to December 11, 1941.

The Government's charge therefore reduces itself to this,—that Commodities, before the War, and before there was a ceiling price, deliberately kept its high-price pepper and sold its low-price pepper so that if a War should happen, and if its pepper should be requisitioned by the Government, the requisitioned pepper would have a high cost.

In addition to this the Government's statement is a charge that Commodities deliberately made apparent and

*NOTE: *Commodities Trading Corp.* v. *Federal Surplus Com. Corp., et al.*, Civil Action No. 23573, U. S. D. C. for Dist. of Col. referred to in Brief of U. S. page 50, note.

taxable but unreal profits prior to the War by selling its low-price pepper and keeping its high presumably so that it could pay income and excess profit taxes thereon to the Government.

On this same page 100, after stating how Commodities had "*inflated*" its costs, the Government continued:

> "If more realistic and fairer methods of determining costs are adopted, there is no basis for the claim that the Price Administration under-estimated the cost of Commodities' pepper."

The Price Administrator's cost, above referred to, was a total of 5½¢ cents for cost of pepper, storage, insurance, interest, shrinkage and other overheads.

As above stated, the Court of Claims found a price of 12.7 cents, omitting many important overheads (Spec. Fdg. 24, R. 21-22).

This was not a new matter, but was thrashed out before the Commissioner of the Court of Claims and before the Court of Claims itself and in the applications for certiorari to this Court, but the Government persists in making these wholly unfounded charges.

A further example of statements in the Government's Brief, which are contrary to the facts, is as follows:

The Government asserts (Br. 31) that two of Commodities' expert witnesses agreed that 6.75¢ a pound for pepper was approximately the *fair* market price as of December, 1941, and cites R. 59 and 88. This statement is contrary to the evidence. The testimony referred to begins at the bottom of R. 58, where the witness was cross-examined by the Government's attorney, and is as follows:

> "Q. O.P.A. prevented a seller to be a willing seller, how? A. Because O.P.A. put out an unfair price

> to the holders of pepper which the holders of pepper did not want to sell at, and the trade has been trying all that time to change the mind of O.P.A. and bring about a market but the O.P.A. would not listen to the advice of the trade * * * " (R. 59).
> "A. The ceiling price which was established on December 7th was low. It was according to the market of that month" (R. 59).

The witness continued (R. 60) and said that every member of the Advisory Committee on Spices had repeatedly advised the O.P.A. that by holding down the price of pepper to what was an unfair and impossible level it was creating a scarcity which would bring about a tremendous reaction later on (R. 60).

The testimony of the other witness referred to showed that the spice trade considered that the O.P.A. ceiling price was too low except as a temporary expedient. He stated that when the price was fixed O.P.A. had agreed with the Committee of the Spice Trade that as conditions changed the price would be adjusted, and stated further "That was what we were hollering about all through the later years of the War. It got scarce, World prices kept getting higher up and we kept making repeated representations to the O.P.A. to increase the price so that we could do business" (R. 88).

Throughout his brief, the Solicitor-General refers to Commodities as having a near monopoly of all the pepper in the country, and as being responsible for the fact that there had been no market for nearly a year prior to the requisition (Br. 17, 22, 63-66). These statements are most unfair.

It is true that Commodities had 16 million pounds of Whole Black Pepper in May 1944, out of a total of about 30 million pounds in the hands of importers, but there was 13,698,000 pounds in the hands of grinders (R. 128) and

the record does not show what stocks were in the hands of wholesale grocers, in the hands of the tens of thousands of retail grocers, or in the hands of the millions of housewives, who stocked up on pepper and other non-perishable commodities as soon as a scarcity threatened. Besides this, there was, of course, the stock of 20 million pounds in India earmarked for the United States, which the Indian dealers could not dispose of to any one else. This pepper O.P.A. was keeping out of the country and preventing a market by refusing to cooperate with the Department of Agriculture and the Allied Food Control Board (Spec. Fdg. 23, R. 21, Tr. 77-78) and ignoring the wishes of the entire pepper trade (R. 63-64, Tr. 77-78).

It is true that Commodities refused to sell at the 6½ cent price, but so did all the other holders (Spec. Fdg. 19, R. 19) and with respect to this matter, the Court of Claims found that the leading men in the industry, importers, brokers and dealers, all recommended that the price be increased, and that it was much too low (Spec. Fdg. 16, R. 18).

Moreover, at this time O.P.A. was permitting the sale of imitation pepper, consisting of one-fourth or less real ground pepper, at a price to yield the seller a return of about 30 cents net on the pepper contained (Spec. Fdg. 18, R. 18-19). (See Commodities' Main Brief, p. 57.)

Furthermore, this refusal to sell was with respect to pepper which had an average cost to Commodities of more than 14.59 cents per pound, which O.P.A. was demanding that it sell at 6½ cents (R. 93). At the same time, O.P.A. was allowing, according to its own admission, an unconscionable profit to packers and grinders who would use Commodities' pepper if it sold. Thus, when O.P.A. increased the ceiling price from 6½ cents to 10 cents in October 1944, it stated:

> "* * * The increase granted will not affect the cost of living since the increased cost to the indus-

trial users is only a very small element in the cost of their finished products and can be absorbed; nor is any change made in the price of consumer-size packages. *The present margin of profit of packers of consumer-size packages is believed to be sufficiently adequate to permit them to absorb this increase in the maximum price of the whole pepper.*" (Italics ours.) (O.P.A. Reg. 52, as Amended Oct. 9th, 1944.)

Thus, the pepper packers were making so large a profit that a 60 per cent. increase in the cost of the pepper to them was held not to justify any increase in their ceiling prices, but Commodities was expected to sell for less than half of cost.

**Summary of Argument.**

The Solicitor General has cited 83 cases, numerous references to foreign laws, treatises, law reviews, etc.

These citations cover an expanse from Blackstone and Grotius to the case of *United States* v. *Toronto, Hamilton & Buffalo Navigation Company*, decided December 12th, by this Court.

(His brief was served upon Commodities on January 5th, but a typewritten copy was served about a week previously.)

It has, of course, been impossible for Commodities to prepare a criticism distinguishing the cases cited, but it does not consider this necessary as there have been several recent decisions of this Court which all seem to sustain Commodities' views.

Moreover, the Government's position must be a weak one when it is considered necessary to pile up authorities or references to such an extent.

The latest three decisions by this Court on the subject of just compensation that Commodities has found are

*United States* v. *Felin & Co.*, 334 U. S. 624;
*United States* v. *Cors*, 337 U. S. 325.
*United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, this term, No. 39, decided December 12, 1949.

While the allowance for just compensation made by the Court of Claims in each of these cases was held not to have been properly supported, in each instance the Court has apparently reiterated the rules contended for by Commodities, which are those so clearly set forth in *United States* v. *New River Collieries Co.*; namely, that one whose property is taken is entitled to be reimbursed for the loss which he has sustained, and that just compensation is a matter of judicial determination.

In the *Felin* case, above referred to, the Court says:

> "Just compensation is a practical conception—a matter of fact, and not of fiction" (334 U. S. 624, 641).

and further:

> "In enforcing this Constitutional requirement (the just compensation required by the Fifth Amendment), the question is: 'What has the owner lost, not what has the taker gained?' (*Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *McGovern* v. *New York*, 229 U. S. 363). Respondent's sole claim is for the pecuniary equivalent of the property taken."

In the *Cors* case, while there was disagreement among the members of this Court as to the justment to be rendered, the Justices were all agreed that just compensation was a matter for judicial determination.

The Government's counsel apparently admits this last point, but in a statement of the greatest sophistry that has come to the attention of Commodities' counsel in a long practice, says:

> "E. Acceptance of the price ceiling as the proper measure of just compensation would not invade the judicial function in requisition proceedings. Even if one accepts the principle that the courts alone have the power to develop and establish the rules and measures governing eminent domain awards, there is nothing to prevent the courts from independently accepting and using valid price ceilings" (Br. 20, 21).

Of course this Court could accept any price that it found just and reasonable, but the Government's argument is that the Court *must* find the ceiling price to be just compensation—*as an independent determination!*

There is no support for the Government's contention that there was any Administrative adjudication in this case. This is discussed in the "Facts" *supra.*

Moreover the ceiling price, so far from being recognized as fair and reasonable, had the condemnation of the entire pepper trade and was maintained in violation of O.P.A.'s representations to the trade when it was first fixed (Spec. Fdg. 16, R. 18). Nor was this ceiling price one which the Government as a whole approved. The Department of Agriculture induced the Allied Control Board to set aside many million pounds of Indian pepper for importation by the United States. This pepper was earmarked for the United States and the Indian holders were prohibited from selling elsewhere. The plan was to provide for the importation of the pepper in manner similar to the plan which had been put into effect with respect to Indian cinnamon, but O.P.A. upset the arrangement by refusing to increase the ceiling price to a

point where this Indian pepper could be imported (Tr. 76-78, Spec. Fdg. 23, R. 21).

However, after Commodities had parted with the greater part of its pepper under pressure and after the Government had ceased to requisition, O.P.A. did permit the importation of much of this Indian pepper at prices as high as 23¢ per pound (R. 46-48).

At the time of requisition Commodities had many opportunities to dispose of its pepper through perfectly legal channels and obtain therefor compensation two or three times or more than the ceiling price (see Main Brief, Point VII). At the time of the seizure pepper was selling in countries where there was no price control for as much as $2.00 per pound (R. 72). The world had been swept practically bare of pepper except in India, which consumed most of its pepper, itself (R. 44-45, Spec. Fdg. 23, R. 21). It was obvious at that time May, 1944 that the end of the War would see very high prices for pepper. This was predicted by the entire Spice Trade and represented to O.P.A. (Spec. Fdg. 16, R. 18). Pepper is not perishable and lasts unimpaired in value for many decades (Spec. Fdg. 25, R. 22). Commodities could have kept its pepper and sold at high prices at the end of control. This was clearly apparent in May 1944.

Commodities contends that both by reason of its ability to sell currently in May, 1944 far in excess of the ceiling price, and its ability to hold its pepper and sell for as much as ten times the ceiling price at the end of price control, the ceiling price was in no way the measure of the value of its pepper and that said pepper had a value equal to the 22 cents demanded in the complaint as a minimum, particularly as its pepper would have had a market value of at least that amount in the United States in May, 1944, if there had been no War (see Main Brief, Point IX, pp. 48-53).

Moreover, O.P.A. thwarted the plans of the Department of Agriculture and the Allied Food Board to bring

Indian pepper into the United States and make a market for it there similar to what had been done in the case of Indian cinnamon (Tr. 76-78).

In view of all of the foregoing, who was responsible for preventing sales of pepper in the United States in 1944?*

## FIRST POINT.

**While Commodities believes that general well-established rules for determining "just compensation" entitle it to all that it asked in its complaint, it considers that the general equities are nevertheless the strongest basis upon which to present its case, and accepts the challenge made in the Government's Point I.**

The Government, in its Point I, says that in determining "just compensation" a balance is struck between the public's need and the claimant's loss, cites many cases (Br. 25), and states that:

> "The Constitution does not incorporate any particular standard or measure of payment—be it 'market value' or 'value' of any type—and, as recent opinions emphasize, mechanical, mathematical, or routine standards often have been rejected because of the demands of equity" (Br. 26).

and then epitomizes its contention as follows:

> "Thus, the only fundamental measuring rod laid down by the Fifth Amendment—and, consequently, the only basic standard to be applied in this case—

*Note: In 1945, after Commodities had been coerced into selling a large portion of its pepper at 10 cents a pound, O.P.A. did permit the importation of Indian pepper and payment of 23½ cents per pound therefor (R. 47). Furthermore, O.P.A. permitted importers, a classification in which Commodities Trading Corporation was placed, to sell for $1.00 a pound in South America, Indian pepper, which they had been permitted to purchase for 23 cents per pound. This right was denied to Commodities (R. 46-49).

> is that the compensation to be paid to the owner be fair and just both to him and to the public. And to the extent that the subsidiary standard of 'market value' is to be used, it must be a '*fair* market value,' from which all elements tending toward an inequitable result have been abstracted" (Br. 28-29).

In developing this Point, the Government seems to have discarded all rules for determining just compensation which this Court has laid down over one hundred years and has advanced a theory that just compensation is purely an equitable matter and is to be determined in each case solely upon equitable principles, without any established guides, and may vary with the ideas of the particular Court which makes the determination, somewhat like the old equity rules in England, which were said to vary with the size of the Chancellor's foot.

While Commodities cannot subscribe to the above, it considers that its strongest claim to compensation consists of the general equities in the case as follows:

(a) Commodities built up laboriously over six years an inventory in the United States of over 25 million pounds of pepper, which total was reached in 1939 (R. 14). When the war clouds appeared in the East, Commodities did not buy more, or try to run up the price of a commodity from the supply of which we might be cut off, but reduced its holdings by 8 million pounds between 1939 and December 7th, 1941 (Spec. Fdg. 5, R. 13-14).

It held 21,000,000 pounds at the time War broke out, approximately 4,000,000 pounds of which had been sold for future delivery, and were delivered during the first months of 1942 (Spec. Fdg. 5, R. 13-14).

Its dealings were largely responsible for the fact that the beginning of the War found this country in the fortu-

nate position of having more than ten times as much pepper in storage than was usual during the years prior to this Company's operations (R. 134).

(b) Commodities repeatedly offered to let large amounts of its pepper to go at cost or less (Spec. Fdg. 22, R. 20, 123, Def.'s Exh. 5, R. 135, received R. 125).

O.P.A. prevented the acceptance of these offers and insisted that Commodities sell only at the ceiling price of 6½ cents, despite the fact that its costs have been shown *supra* to have been substantially in excess of 12.7 cents per pound.

2½ million pounds of the above unsold 17,000,000 pounds were requisitioned. (See Suits of *Commodities Trading Corp.* v. *U. S.* in Court of Claims No. 47587, 47588. Note on page 8 of Government's Brief.) The remainder was finally sold by Commodities during price control at average prices much below those at which the Government, or anyone else, was able to buy pepper in the latter days of the War, and went far toward relieving the pepper shortage which existed (Spec. Fdg. 19, p. 19).

Commodities does not claim to be a charitable organiization, but it thinks that it is entitled to some consideration for having imported and built up and carried for 11 years a great supply of pepper, something no one else had done. A supply which was availed of by Army, Navy and public to relieve an acute shortage.

(c) Commodities was not a dealer in pepper in the ordinary sense (R. 52-53, Def.'s Ex. 5, R. 133, Received R. 125). It had no customers and was under no obligation to supply anyone. It belonged to no trade organizations, but was an investor, which started out in 1933 to accumulate a large inventory, and hold it for the high prices that were bound to come with the turn of the cycle of prices which had been repeated with considerable regularity for

more than seventy-five years (R. 53, Spec. Fdg. 9, R. 15-16). (See Main Brief, p. 23, *et seq.*).

If it had been allowed to keep its pepper until the end of price control, it could have sold it immediately at from 50 cents to 60 cents per pound and have made a great profit, several million dollars (Spec. Fdg. 17, R. 18). But it was hounded and practically forced to sell the remainder left after the requisitions at prices only one-fourth or one-fifth of what it could have obtained at the end of the War, and at no more than one-twentieth of prices which obtained during the War in countries where there was no price control, said uncontrolled prices being as high as $2.00 per pound (Spec. Fdg. 19, R. 19, 62, 79). The requisition deprived Commodities of a substantial part of a wonderful investment. While it started out to hold its pepper "in anticipation of the rise in price which the history of the industry showed was bound to come" even if there had been no War (Spec. Fdg. 26, R. 22-23, Graph in Spec. Fdg. 9, R. 16, R. 26, 53), the inevitability of high prices at the end of the War was made more certain by the destruction following the Japanese invasion of Indonesia (R. 46, 102).

(d) The Government, in the case of pepper, as in the case of practically every other substance which the Army required, requisitioned quantities far in excess of the Army's actual needs (R. 72-73; Tr. 82-83).

At the end of the War, it was importuned by the persons from whom it had requisitioned pepper to return the surplus *pro rata* to the requisitionees (Tr. 83, R. 73). This it refused to do (Tr. 83, R. 73) but later, the Government, which as a matter of "fairness and equity" is seeking to restrict Commodities to 6½ cents, offered to sell *pro rata* to requisitionees, including Stockholders of Commodities (which had been dissolved meantime), a small percentage of the pepper which had been requisi-

tioned at a price of 75 cents per pound!! (R. 116-117, Pl.'s Exhs. 5, 6A, 6B, 6C for id. offered R. 117-118, 132). This offer was accepted by some of Commodities' Stockholders (R. 117), and it is a matter of public record that large quantities of surplus pepper were sold by the Government at prices approaching said 75 cents.

While it was impossible for Commodities to obtain the detailed facts, this Court, on the basis of general public information, would be warranted in assuming that the Government could pay Commodities, and other requisitioncs, the full price per pound asked in this Complaint, and still get all of the requisitioned pepper which it actually supplied to the Armed Forces, *without cost to itself*, in view of the huge profit on the surplus.

Proof of the 75 cent offer was attempted by Commodities upon the trial before the Court of Claims. The offers to four of the Stockholders of Commodities were marked as Plaintiff's Exhibits 5, 6A, 6B and 6C, for Identification. They were all identical, and a sample appears as Plaintiff's Exhibit 5 for Identification (R. 131-133). The papers were first identified (R. 93) and were offered (R. 116-118).

The papers were not received in evidence and the Court of Claims refused to make finding thereon.

Error was assigned therefore. Nos. 55, 56, 57 and 58. Such a ruling may have been correct if the just compensation for Commodities' pepper were to be determined according to the regular rules which have been commonly applied. However, if the question is one of general equities only, and of what price would be fair to the Government and fair to Commodities, the fact that there was this great increase in the price of pepper, which Commodities lost through Government action and by which the Government gained so greatly, seems to be more relevant and important.

(e) The cost of Commodities' pepper to it in May, 1944, was 14.59 cents, with several important overheads

not included, and with valuable contributions of time and labor without charge by the four Stockholders, according to the testimony of the Company's accountant (R. 93).

The cost of the pepper, according to the Findings of the Court of Claims was $0.127 (Spec. Fdg. 24, R. 21-22), but this Finding, upon its face, states an omission of interest upon cost of storage for eleven years in the case of some of the pepper, and many omissions and obvious understatements, the addition of which would bring cost of the pepper to 20 cents or more (R. 22) (See Point XII of Main Brief). Error was assigned to this finding. See pp. 17-18 of Main Brief.

(f) Plaintiff had the opportunity to sell its pepper currently for far more than the ceiling price, as follows:

(a) By grinding the same and mixing with cheap ingredients and selling the total for 16 cents a pound, to obtain approximately 30 cents per pound on the pepper contained in the concoction (Spec. Fdg. 18, R. 18-19) (Main Brief, pp. 57-58).

(b) By selling to Porto Rico, Hawaii and Alaska at prices more than twice the ceiling price of 6½ cents, no license required (Spec. Fdg. 20, R 19, O. P. A. Price Regulation 52, Tr. 154) (Main Brief, pp. 44-45).

(c) By selling to Central, South America and other sections of the Western Hemisphere for prices far in excess of ceiling prices, but export licenses required (R. 41, 79-7, 98-92) (Main Brief, p. 45).

(d) By selling to steamships, Red Cross and others, in slightly less than full one-bag lots (F. D. O. 19) (Main Brief, pp. 43-44).

(g) Commodities could have retained its pepper and sold it at the end of price control for prices which were

actually six or seven times the ceiling price of 6½ cents, and which it was plain in May 1944 would be approximately that high (Spec. Fdgs. 16, 17, R. 18) (Main Brief, pp. 53-57).

(h) Pepper would have sold in New York, in May 1944, for a price in excess of 22 cents a pound, had there been no War (Main Brief, pp. 48-53).

On a basis of pure equity, this is one of the strongest of all of Commodities' points.

The Army needed pepper. Its only source of supply, except requisitioning pepper in the United States, was to buy Indian pepper at a cost of 21 cents delivered alongside, plus the cost of handling, etc. (Spec. Fdg. 23, R. 21, 44-45, 47-49).

Commodities' pepper would have sold for as much as that, if there had been no War (see Main Brief, Ninth Point, pp. 48-53).

The Government condemns this point as purely hypothetical and says that there was a War (Br. 94-95). However, in the next sentence almost, it declaims against Commodities being allowed War profits. Commodities confidently submits that the point in question is a relevant and important one in any case, but, surely, if the question is one only of general fairness, the Government cannot deprive Commodities of the value that its pepper would have had in May 1944, due to causes which had taken place prior to December 1941, and wholly without regard to War, because the value of the pepper had been further increased by the Japanese invasion of Sumatra and the attendant destruction.

Moreover, the force of the Government's criticism is destroyed by the fact that it cites, in support of its argument that "just compensation" must not include War profits, the British Indemnity Act of 1920, which provided that compensation for the taking of vessels should take account of the profits which the owner would have made

if there had been no War, and not take account of any increase of market values of tonnage or rates of hire due to the War (Government's Brief, p. 86).

(i) Pepper was discriminated against and the O.P.A. refused to keep its agreement with the Spice Trade with respect to pepper and refused to permit the Combined Food Control Board and the Department of Agriculture to carry out their plans for the importation of Indian Pepper (R. 88, Tr. 77-78, Spec. Fdg. 23, R. 21).

As this Court doubtless knows, there is a great variety of spices. Black Pepper is the most important, with cinnamon next (Tr. 76). These spices are all, or practically all, grown in foreign tropical countries. The War cut off much of the supply, but there was a world production and a world market. With respect to all of these spices, except pepper, the O.P.A. fixed no ceiling price at the beginning of the War and allowed the price to rise during January, February, March and April and prices therefor were finally frozen by ceiling prices based on the March 1942 prices (R. 54). The ceiling price fixed for Black Pepper was less than one-half of the average price therefor for fifty years preceding the War (R. 44), whereas the ceiling prices for all other spices were far in excess of said prewar averages.

Thus, the testimony was (R. 44):

> "Q136. How did the ceiling prices that were fixed for those spices compare with the average prices of those spices for a number of years prior to the war? A. All ceiling prices were considerably higher than the average prices before the war. Certain articles like cinnamon went up as much as six or seven hundred per cent. Nutmeg, went up about four hundred per cent. Mace went up about one to two hundred per cent. I could go on that

way, but I think that gives you an idea. Ginger went up two hundred per cen

Q137. Is that illustrative what happened in the whole line of prices on s ces? A. Yes, sir."

If pepper had been treated exactly as the many other spices were treated, the ceiling price would have been fixed at from 30 to 40 cents per pound (R. 54).

O.P.A. agreed to an arrangement with respect to cinnamon to permit, and which did permit, the importation into this country of Indian cinnamon from the Island of Ceylon and which provided a fair supply to cinnamon users during the War (Tr. 77-78), but refused to permit a similar arrangement with respect to the importation of Black Pepper (Spec. Fdg. 23, R. 21) sought by the Combined Food Control Board and by the Department of Agriculture (Tr. 77-78).

Thus, cinnamon, which had sold for from 12 to 15 cents a pound immediately before the War, was allowed an O.P.A. ceiling price of from 55 to 60 cents a pound (Tr. 78-79). But pepper which was selling at 6¾ cents immediately prior to the War, was denied a ceiling price sufficient to bring in Indian Pepper, which was selling at 21 cents, delivered in New York (Spec. Fdg. 23, R. 21).

O.P.A. broke its agreement with the Spice Trade by the above refusal (R. 88). Of course, the Spice Trade recognized that when the supplies of spices on hand in the United States were used up, they would have to pay prices sufficiently high to bring about exports to the United States from those countries which were not cut off by the War.

In the case of pepper, as there was a large supply on hand at the beginning of the War (21 million pounds in the hands of Commodities alone) (Spec. Fdgs. 5 and 8, R. 13-14, 15), and as the frightened Indonesians were dumping their pepper on the New York market (R. 108-109) at such a rate that there was 78 to 100 million pounds in the hands of importers in March, 1942 (Spec. Fdg. 8,

R. 15), the Spice Trade (not including Commodities, which was never identified therewith), agreed to a ceiling price for pepper based on the immediate situation of huge supplies and large importations, but with the agreement on the part of O.P.A. that the price would be changed with the changing conditions which the trade foresaw (R. 88). But, despite the fact that the Spice Trade protested vigorously against the maintenance of the same ceiling price after conditions had changed completely, O.P.A. refused to budge (R. 88).

(j) The following matters also support the justness of Commodities' claims to 22 cents:

(a) The Spice Trade unanimously advocated a price of from 20 to 30 cents as a fair one (Spec. Fdg. 16, R. 18).

(b) The ceiling price in England was a shilling, despite the fact that England controlled the Indian production, the only production open to the allies (R. 79).

(c) The demand for pepper was so great and the supply so small that in certain countries where there was no price ceiling, the market was as high as $2.00 per pound (R. 62, 79).

But the Government's position seems to be wholly inconsistent. For, after stating that all the equities must be considered and the rights of the Government balanced against the rights of the owner of the property taken, it proceeds to disregard all of the equities, and to state that, regardless of equities and all other evidentiary matters, the ceiling price must control.

Stated briefly the Government's position is as follows: Having no answer to Commodities' proofs of value it has under the disarming title of "fairness

and equity" dragged in a lot of indefinite and irrelevant considerations, resorting even to flag-waving and slurs in an attempt to justify its ceiling-price yardstick for just compensation.

The Government, seeks to avoid the impact of practically the entire and undisputed evidence in the case. Upon its theory, just two facts are relevant:—the existence of the War and the fact that a ceiling price was established.

A large part of the Government's brief is devoted to a reiteration, which it substitutes for proof, that because the Administrator had fixed a ceiling price for pepper, such ceiling price was *fair and equitable*, and therefore the measure of just compensation not only when it was established, but for years afterwards, during which period all of the economic factors controlling value were greatly altered.

## SECOND POINT.

**Commodities had the right and the opportunity, despite all Government restrictions, including the 6½¢ ceiling price, of disposing of its pepper at the time of requisition for compensation far in excess of the ceiling price or of holding its property until the end of price control and of disposing of it for an even greater price. In such circumstances, the ceiling price is not even relevant.**

The right of Commodities to sell its pepper in May 1944 for far more than 6½ cents per pound is shown in Commodities' Seventh Point, page 41 of its Main Brief, and the retention value of its property, or what it was worth in May 1944, based upon the price it could reasonably expect to obtain at the end of price control, is shown in Commodities' Tenth Point, page 53 of its Main Brief. Either of those rights makes the ceiling price wholly irrelevant.

A long line of decisions of this Court has established the general rule that one whose property has been requisitioned is entitled to just compensation measured by the value of his property at the time it was taken, based on what the owner lost, not what the value was to the Government.

*United States* v. *John J. Felin Co. Inc.*, 334 U. S. 624;
*Seaboard Airline Ry.* v. *United States*, 261 U. S. 299, 304;
*United States* v. *Miller*, 317 U. S. 369, 373;
*Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 326;
*United States* v. *New River Collieries Co.*, 262 U. S. 341, 343, and many others.

This rule is restated in the recent decision by this Court in *United States* v. *John J. Felin Company*, 334 U. S. 624, quoted *supra*, page 16. That is much more than Commodities claims in this case.

A modification, or a restriction, of this rule is that where proper Governmental action has reduced the value of property it is that reduced value which the Government is required to pay, and along this line a minority of the Court in the *Felin* case suggested that the ceiling price was the measure of just compensation where a dealer in perishable property suffers a requisition thereof. The ground for such opinion was that there was no outlet to the dealer, present or future, by which he could obtain more than the ceiling price for his property because being perishable and he being a dealer, he had to sell and he could not sell for more than the ceiling price.

In the case at bar the Government is asking this Court to hold that the ceiling price is the measure of just compensation, in a case where the owner of the property requisitioned had the opportunity to realize currently for his

property much more than the ceiling price, (Main brief, p. 41, *infra*, 54) and had the right and opportunity to hold his non-perishable and long-lasting commodity (Spec. Fdg. 25, R. 22) until the end of price control and obtain a high price therefor.

Moreover, the Government is asking this Court to apply such a rule to a non-essential condiment not in universal use but prized by epicures in the United States, and by large classes in tropical countries.

In all of the hundred citations and more of the Government, there is not a scintilla of support for such a claim. On the other hand, however, the recent decisions of this Court cited *supra* in this point and in the beginning of its argument are clearly to the contrary.

## THIRD POINT.

**The decision of this Court in United States v. New River Collieries Company, supra, is decisive upon the point that an established ceiling price does not measure "just compensation" where the owner of the property requisitioned can lawfully sell for more.**

In *United States* v. *New River Collieries Company*, 262 U. S. 341, *supra*, a ceiling price under the Lever Act, which was no less sacrosanct than the Emergency Price Control Act, had been fixed, but an opportunity on the part of an owner of requisitioned property to sell lawfully at a price in excess of the ceiling price was held to give him the higher price as "just compensation" for his requisitioned property, despite the fact that he could not sell in the United States at more than the ceiling price.

In that case the facts were as follows: On various dates between September 17, 1919 and February 1, 1921, the United States requisitioned from the Collieries large quantities of coal for the use of the Navy.

While the price fixed by the Government for domestic sales prevented sales in the United States for a price higher than the established ceiling, the foreign market was higher. There was no prohibition against export and the *New River Collieries* had the opportunity to sell in this foreign or export market at a higher price than the ceiling price for domestic sales.

The Government sought to introduce in evidence the domestic ceiling price, and also evidence of the owner's cost of production, plus a reasonable profit. All of this evidence was excluded and the Court held that the Collieries Co. was entitled to the full amount for which it could legally have sold its coal.

The Court makes a number of statements which have been repeated with approval many times since, such as the following:

> "Section 10 of the Lever Act in obedience to the Fifth Amendment provides for just compensation. The War or the conditions which followed it did not suspend or affect these provisions. *United States* v. *Cohen Grocery Co.*, 225 U. S. 81, 88. The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken. • • •
>
> "The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327."

and further:

> "The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned."

This case presents the converse of the question which has been asked so often by the Government and by the Courts in cases where an owner whose property had been requisitioned was not permitted to recover more than the ceiling or program price, such question being, why should the owner of property requisitioned by the Government be put in a better position than he would have been in if his property had not been requisitioned.

In the *New River Collieries* case the question was, why should one whose property was taken by the Government be put in a worse position than if it had not been taken.

That is the precise question which arises in the case at bar.

The case at bar is somewhat stronger than the *New River Collieries* case, in that the record in the latter case indicated that there was no opportunity for the New River Company to sell in the United States, except at or below the ceiling price. Its only opportunity to sell above that price was by shipping its coal abroad. Commodities also had the right to sell abroad at more than the 6½ cent price, but it had the additional right, which the New River Company did not have, of selling currently in the United States for far more than the said 6½ cent price, by converting to synthetic pepper, and by selling in less than one bag lots. See main brief, pages 42-43 and *infra*.

According to the Government, the ceiling price, which the plain language of the Emergency Price Control Act itself clearly indicates was never intended to be the measure of "just compensation", continues to be conclusively "*fair and equitable*", in the face of a mass of undisputed and indisputable evidence to the contrary.

Furthermore, the Government's appeal to the general equities of the situation to determine "just compensation"; rather than to rely on the established rules of law laid down by this Court, involves a novel, though convenient method of interpretation of what is fair and equitable.

"Just compensation" for requisitioned property, says the Government, is that amount which the taker of the property fixes. It is not necessary to consider the question of value. The fact that there were no sales at the price fixed for many months before and after the taking, is not evidence that the ceiling price was unfair, but only of the selfishness and lack of patriotism of all of the owners of pepper.

It is not too much to say, it seems, that if the Government's contention is written into the Law, that the Fifth Amendment to the Constitution, insofar as it requires "just compensation" to the owner for property taken, has been nullified, and the matter of "just compensation" becomes one for bureaucratic determination.

The Government concedes that War does not suspend the Constitutional provision for "just compensation" but it argues as though the O.P.A. did.

## FOURTH POINT.

**The sales of pepper at ceiling prices in December 1941 and in 1942 furnish no basis for determining market value or just compensation for pepper requisitioned on May 26, 1944.**

The findings of the Court and the facts with respect to sales of pepper from the fixing of the first ceiling price in December 1941, to the increase to 10 cents in October 1944, are discussed in detail in Commodities' Main Brief, pp. 31 to 35.

The Government has avoided all detailed discussion of these facts, but persistently throughout its brief states that the reasonableness of the ceiling price was supported by sales made at that price. This, of course, had relation only to sales which had taken place long prior to the requisition here in question. But a complete change had taken place in the two years and more between March '42

and requisition, which prevented actual dealings at 6½¢ and rendered the prices of 1941 and early 1942 wholly inapplicable to May 1944 conditions. The change above referred to, which has already been stated in some detail, included the reduction of the three-year supply of pepper on hand in March 1942, which was practically all the pepper in the world at that time, to 28 million pounds, which was less than a year's supply for the continental United States (Spec. Fdgs. 8, 14, R. 15, 18); the using up of foreign supplies to such an extent that $2.00 a pound was the market price in countries where the price was not controlled (R. 72); and the destruction caused by the Japanese invasion (R. 102).

Market prices of an earlier or later date may be used as evidence of market value at the time of requisition only where it has been clearly shown that no change in conditions has taken place.

In *United States* v. *The Toronto Hamilton & Buffalo Navigation Co.*, decided only last month, Mr. Justice Clark put his finger exactly upon the office of past sales in connection with proving market value or just compensation. He said:

> "At times, however, peculiar circumstances may make it impossible to determine 'market value'. There may have been, for example, so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken. We then say that there is 'no market' for the property in question."

Thus, the past sales must furnish the basis for a prediction of sales prices at the time of requisition. Obviously, the sales in 1942, whether we consider them fair or unfair, furnish no basis upon which to formulate a prediction of the price at which sales in 1944 would take

place after there had been a complete change in conditions.

Furthermore, it is only a *fair* market value which is an indication of value and which is a basis for just compensation.

The Solicitor-General himself, in his statement of his contention with respect to the rule for determining "just compensation" says:

> "And, to the extent that the subsidiary standard of 'market value' is to be used, it must be a '*fair* market value,' from which all elements tending toward an inequitable result have been abstracted" (Br. 29).

Admitting the argument of the Solicitor-General that "the existence of actual dealings between willing buyers and sellers, leading to a real market value validates that *current* price as generally fair, just and reasonable, regardless of the particular owner's desires or intentions", the point of the case at bar is that there were few if any dealings between willing buyers and sellers at any time and none for months prior to May 1944. The sellers were not willing, even prior to February 1942. They were scared. The Indonesian sellers were scared by the imminence of the Japanese invasion, the American sellers by the hostility of Mr. Leon Henderson, the prohibitive margin requirements fixed at his demand, and the discouraging effect of the ceiling price (R. 89-90, 108-109). Moreover, the Solicitor-General himself points out (Br. 27-28) that "even in dealing with the accepted measure of 'market value,' the Court underscores the concept of "'*fair*' market value," and points out that '* * * strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value,

must *in fairness* be eliminated in a condemnation case * * * ' (317 U. S. at 375, italics supplied). Similarly, *United States ex rel T. V. A.* v. *Powelson, supra,* at 279-280, refers to considerations of 'equity and fair dealing' in determining proper measures of compensation."

It would not have been fair to have seized Commodities' stock of pepper which it had built up over nine years (Spec. Fdg. 5, R. 14) and to have compensated it at a temporarily depressed market (R. 26) price. Be that as it may, even this market had practically dried up by the middle of 1942, and there was no selling subsequent to September 30, 1943 (Spec. Fdgs. 14, 19, R. 18, 19). In July 1943 the Department of Agriculture was unable to purchase even a trifling amount of pepper to make good its lend lease commitments except by extraordinary means (R. 129).

The cases cited by the Government such as

*Cudahy Bros. Co.* v. *United States,* 155 F. (2) 905;
*Graves* v. *United States,* 62 F. Supp. 231;
*Lessner Plumbing & Heating Co.* v. *United States,* 64 F. Supp. 931;
*Louisville Flying Service* v. *United States,* 64 F. Supp. 938;
*L. Vogelstein & Co.* v. *United States,* 262 U. S. 337.

are not at all in point.

In those cases the Court found an actual active market and held that such market price measured the market value of the property seized and just compensation therefor.

## FIFTH POINT.

**The contention of the Government that Commodities should have attacked the ceiling price and have had its claim heard before the Emergency Court of Appeals and that not having done so is estopped, is without support in law, would be most unfair to persons whose property was requisitioned, and would be most disastrous to orderly and reasonable price fixing.**

If Commodities had proceeded against the ceiling price of pepper by a demand for a hearing and an increase in price before the Administrator, and then, when he had refused the increase, had applied to the Emergency Court of Appeals, it would most certainly have been met by the defense that it was too late.

The ceiling price here in question was fixed in March 1942. Commodities had no reason to complain about it until demands were made upon it to part with its pepper in 1943. By that time, the sixty day period allowed for attacking a ceiling price had long passed. It is suggested that Commodities could have defeated that contention by alleging that changed conditions were the basis of its application. But, what changed conditions could Commodities have shown, or would it have been permitted to show with respect to production in Sumatra, Japanese destruction there, and other matters which would have affected the ceiling price?

Moreover, as above shown (pp. 7 to 8) no litigant has a fair opportunity in a fight with the Price Administrator.

Furthermore, as above shown, this Court reiterated in one of its most recent decisions, *United States* v. *Cors* (337 U. S. 325), its previous rules that one whose property is taken by the Government is entitled to a judicial determination of the just compensation which should be awarded him.

As shown in Commodities' main brief to this Court, in its Second Point (p. 25), the ceiling price could not be enjoined or set aside unless the complainant had established to the satisfaction of the Court that the order or Price Schedule was arbitrary or capricious. This places upon a litigant a burden much greater than that ordinarily imposed. In effect, it deprives him of his right to have the value of his property determined by the Court because it has been held in construing the provision above referred to, that the Court may not substitute its judgment for the judgment of the Administrator (*Madison Park Corporation* v. *Bowles*, 140 Fed. [2] 316). Therefore, in a trial before the Emergency Court of Appeals you do not necessarily get the judgment of that Court as to the value of the property or the fairness of the ceiling prices.

Furthermore, any such rule would be disastrous to price control, in case of another War, or in an emergency which required the fixing of thousands of prices in a short space of time. Consider what would happen if the view of the Solicitor-General is upheld.

In the case of the fixing of general ceiling prices for commodities of all kinds, it would be inevitable that many of such ceilings would cause injury to persons affected thereby, or many persons so affected might anticipate injury therefrom. In all such cases the person hurt or fearing injury would have to rush to the price-fixing body and demand a hearing and a change in the ceiling. The entire time of the Bureau would be consumed in hearing these complaints. It would, of course, deny most of them and petitioners would flock to the Emergency Court of Appeals and demand a review of the prices. The amount of litigation would doubtless be increased a hundredfold. The successful attacks on the ceiling price would usually result in the withdrawal or increase of the prices with respect to the entire industry, and many persons who had

low costs and were willing to sell at the ceiling prices, would get more.

A great many of the same ceiling prices would be under attack from some one or more of the persons affected thereby and the price scheme would be in doubt and business in confusion. Any merchant having goods of a class subject to a ceiling price which he knew was under attack would be loath to sell at that price until he knew the outcome of the attack.

It would be hard to imagine any rule of law or procedure that would cause a greater mess than that contended for by the Solicitor General.

On the other hand, the law which has been interpreted generally, as Commodities has interpreted it, has worked well. No one is compelled to attack it. The law, itself, provides that it does not require any one to sell at the ceiling price that does not wish to sell (Emergency Price Control Act, U. S. C. A. Title 50 App. Sec. 904[d], 56 Stat. 28).

So, unless his property is one which may under a broad interpretation, be required for the defense of the country, no property owner need be disturbed by a ceiling price and may hold his property. If his property does come under the class which permits its requisition under the broad terms of the October 16, 1941 Law he need not fly into Court to protect his rights against possible injury. He can wait until his property is requisitioned and then apply for just compensation. This means that in most cases instead of having a deluge of petitions and litigations during the War while the energies of the price-fixing Bureau are strained to the utmost to carry on their daily tasks, the determination of the fairness of prices is usually deferred until long after the War and after the emergency is past and when the fixing of a price by it, small or large, has no effect upon the War economy.

Moreover, the rule contended for by the Solicitor-General would be most unfair and burdensome to property owners affected by ceiling prices. A property owner who feels that the ceiling threatens him with loss must at a time when his force is depleted and when there are many dislocations in business, give his time and attention to an attack upon a ceiling price which may never injure him.

Furthermore, in making this attack, he is greatly hampered, for, bearing in mind that requisitions are restricted to the classes of property that directly or indirectly contribute to the War effort, it will be seen that much of the data necessary to prove the unfairness of a ceiling price may well be of a nature that it would not be in the public interest to disclose, and, furthermore, in time of War, evidence with respect to Government transactions and statistics are doubly difficult to obtain. Oftentimes the witnesses are not obtainable.

With this in mind, the Statute wisely gives one whose property has been taken six years within which to bring his suit, at which time the War will be over, the business conditions will have straightened themselves out, the claim can be considered on its merits, and without the hysteria which often enters into all human relations during time of War, and the evidence will be procurable without disclosure of matters which might be prejudicial.

## SIXTH POINT.

**No Distastrous consequences would result from permitting a court rather than O. P. A. to fix just compensation.**

The Government's counsel has conjured up alleged disastrous results which would follow from this Court's permitting the Court of Claims or the Federal, District and Circuit Courts to determine just compensation where O.P.A. had fixed a ceiling price. He claims that inflation and many other serious results would follow such a course.

These are all pure figments of the imagination. Nothing of the kind could possibly follow. *In the first place,* let us assume that O.P.A. or other price-fixing body, is fairly competent and wishes to do a fair and just job. In such case the great majority of the ceiling prices would be fair, and being fair, there would undoubtedly be a market and requisition would not be necessary. As long as there were some who could make a profit at the ceiling price there would be sales.

It is a matter of common knowledge that in every business of any importance in the United States, in which large numbers of dealers, producers, or manufacturers were engaged, the costs of the various concerns would vary substantially, and that there would be a market for the product unless O.P.A., or the price-fixing agency fixed a ceiling price that was too low for the producers in the lowest cost bracket to make a profit.

If there were any substantial sales at or near the time of requisition the Court would hold that such sales measured the market value of the property requisitioned and limit "just compensation" to such prices.

Moreover, the just compensation which the Court will award must be assumed to be fair and just and that required by the Fifth Amendment. It is most unreasonable to suppose that the Courts will not be diligent to prevent unjust and invalid claims so that the net result of the Courts making their own determinations of just compensation instead of taking that of O.P.A. would never amount to more than just compensation based on all the relevant facts. Nor, would the matter of price regulation be upset by permitting persons whose property was requisitioned to obtain judgments of the Court as to the value of their property, rather than having the same fixed by O.P.A. ceiling price. There is certainly no threat to price fixing in the decisions of the Court of Claims on just compensation to date.

Furthermore, while price fixing covered almost all the products of trade and commerce the right to requisition was comparatively limited.

The right of the Government to requisition private property is restricted to those cases where directly or indirectly, the property sought may furnish some aid to the defense of the country (See Sec. 1, Act of Oct. 16th, 1941). This was held in the case of *Commodities Trading* v. *Federal Surplus Commodities Corp.*, referred to in Note (Gov. Br. 50). In many large fields where property is of a kind not required, directly or indirectly for the defense of the country, requisitioning cannot be called into play. Except munitions and certain metals which might be directly required for the defense of the country, most other classes of property would either be wholly exempt from requisition, or subject thereto to a small extent proportionably.

In the case of all, or most, foodstuffs grown in the United States, the farmer had a liberal price allowed to him which O.P.A. could not reduce.

While Government buying completely dominates munitions markets and may in a sense dominate some other markets in that it is so much larger than that of any individual buyer it is nevertheless only a small part of the total buying of any ordinary commodity. The buying necessary to feed and clothe the 144,000,000 people out of the armed services was many times that required to feed and clothe the average of 6,000,000 in those services. For the above reasons the percentage of cases where the Government would have to requisition would be small.

The refusal to sell in order to force requisition is no quick and easy road to gain.

Consider the provisions of the Act of October 16, 1941. An owner is offered a price. If he rejects that price he is not paid the higher or so-called inflationery price which he thinks his property is worth, but he is paid

on the basis of what the Government thinks it is worth, and only half of that. He then goes through a long and expensive routine of claims and demands and counter-demands, which are all futile and useless, and which end in a final determination that the O.P.A. price offered was fair and all that the Government should pay. His case has then reached the justiciable stage and he files his complaint with the Court of Claims, or in a District Court, and after months of litigation and expense, the amount of his just compensation is finally determined.

It is hard to see how the granting of such a right would upset the economy of the country or result in uncontrolled inflation.

In the case at bar it may be noted that instead of receiving the 50% of what the Government stated was the fair price of its pepper, Commodities received nothing until several weeks after it had brought suit, and more than eighteen months after its property had been seized (Spec. Fdg. 7, R. 14, 15).

To sum up, if we assume that the great majority of the ceiling prices are fair, there would certainly be no need for requisition, because the owner would sell. Even if prices were not fair to all owners, unless the trade were a very small and restricted one, like pepper, there would be a substantial number of sales by persons who had low prices, and this would fix a market which would limit the recovery of the dissatisfied owners.

In those cases where the property is subject to seizure any litigant would accept the ceiling price if it were anywhere near fair or just rather than be put to the trouble and expense of a litigation. Refusals to accept the ceiling price and a resort to the Courts could arise only in those cases where the ceiling price was manifestly far below just compensation.

## SEVENTH POINT.

**Plaintiff's claim does not include any element of increase in price due to the need of the Government or even due to our War.**

As above stated, plaintiff's claim is for 22 cents a pound only, at a time when pepper was selling for $2.00 a pound, where there was no price control (R. 79). This would discount many times any possible element of value due to the War in general, or to the Government's need of this particular article. However, without regard to the said discount, neither of those elements would have affected appreciably the price of Whole Black Pepper in the United States.

In the first place, pepper was not an article required for War, and the demand therefor in May 1944 was not increased by the War. That is to say, pepper was used by the Government in no other way than by ordinary civilians, namely, as a condiment in connection with food.

The Government's takings of pepper did not increase the general demand therefore. Pepper is a commodity which is in use by a large percentage of all the 150 million people in the United States.

The demands of the Government with respect to approximately 10 million people in the Army and Navy, most of whom probably consumed pepper before they were inducted into service, could not have had any appreciable effect upon the entire national demand. On the other hand, the demand was actually greatly reduced by the rationing of pepper and permitting grinders to sell in 1944 only 40 per cent. of their prewar sales (Spec. Fdg. 13, R. 17-18). Moreover, pepper has a worldwide use and a world market (R. 40-41) and any increased use of pepper for Army consumption would be negligible on the total world demand and world supply.

The reason for the shortage of pepper in the United States in May 1944, other than the refusal of O. P. A. to admit Indian pepper, above referred to, was the fact that the great pepper producing section of the world, Sumatra, was in the hands of the Japanese (R. 46, 102).

Does the "just compensation" provided for by the Fifth Amendment contemplate the elimination from allowances therefor may element of value or price which may have resulted from a foreign War?

In was not *our* War with Japan that made pepper so scarce in the United States. It was the War declared upon Holland by the Japanese, and particularly its invasion and seizure of the Indonesian Islands (R. 46, 102). There would doubtless have been the same scarcity of pepper in the United States if it had remained out of the World War, and if the War had been confined to Germany, Italy and Japan against the other countries which participated therein, exclusive of the United States (Spec. Fdg. 26, R. 22-23, also Spec. Fdg. 9, R. 16, 81, 99-100, 101-102, 107).

On the other hand, if Japan had not been at War with Holland, there would have been no trouble in our obtaining pepper from Sumatra. We were able to get supplies of all kinds from India without difficulty.

Commodities submits that to hold that any increase in the price or value of pepper due to the War should be eliminated in determining just compensation, would be taking a long step away from the intent of the Fifth Amendment.

Commodities, further submits that any increase in the value of pepper, due to the destruction caused by the Japanese, is another factor of value, which should not be eliminated. This destruction caused a worldwide shortage and a worldwide increase in price, particularly following the War (R. 46, 102). That this would take place was well known in May 1944, and an allowance for "just com-

pensation" should not exclude a consideration of these circumstances.

However, as shown in the following point, Commodities' claim is restricted to a value which its pepper would have had, even if there had been no War.

## EIGHTH POINT.

**Commodities is entitled, as a minimum, to the value which its pepper would have had in May 1944, if there had been no War.**

This point has been discussed in Commodities' Main Brief, Point IX, and has also been alluded to in Section (h) of Commodities' First Point in this Brief, on "general equities", and will not be discussed at length here. But, as Commodities considers this a point of importance, it wishes to stress it and will make the following brief statement.

The Government has condemned the above Point as purely hypothetical, and says that there *was* a War. There are, however, many matters connected with this point which are not hypothetical:

The Japanese destruction in Sumatra (R. 46, 102) was partly responsible for the high prices of pepper that obtained at the end of the War, but only partially responsible therefor.

The five year failure of the Sumatran growers to plant new pepper, and their neglect of the established gardens would have brought about prices higher than 20 cents a pound, even if there had been no War (Spec. Fdg. 9, 26, R. 16, 22-23, 45, 66-68, 81, 98-102, 107).

As shown in Commodities' Bain Brief, page 53, the above cessation of planting had already caused a falling off of 40 per cent. in production, and was sure to bring out a much greater falling off in the future, and that a

shortage of pepper would exist for approximately seven years after the natives returned to planting.

The Court of Claims found that this would have brought about prices higher than the 6½ cent ceiling price, but did not find a definite figure (Spec. Fdg. 26, R. 22-23). The evidence shows, however, that this price would be in excess of 20 cents (see Main Brief, pp. 48-53).

Now, even if the profit is to be taken out of War, and no advantage allowed which comes directly or indirectly therefrom, it would be the height of injustice and inequity to disallow that part of the increase over 6½ cents which would have taken place in the price and value of pepper, if there had been no War.

Commodities submits that this is a sound and conclusive argument in any view of "just compensation", but the argument becomes the stronger in view of the stress which the Government has put upon fairness and equity.

Moreover, the force of the Government's criticism of this Point (Br. 94 *et seq.*) is destroyed by the fact that it cites, in support of its argument that "just compensation" must not include War profits, the British Indemnity Act of 1920, which provided that compensation for the taking of vesels should take account of the profits which the owner would have made if there had been no War, and not take account of any increase of market values of tonnage or rates of hire due to the War (Government's Brief, p. 86).

## NINTH POINT.

**The ceiling price for imitation pepper furnishes a measure of the value of Commodities pepper.**

The Court of Claims found:

> "18. During the years 1943 and 1944, which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and

sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agents.

This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound" (R. 18-19).

The Attorney General, in the Government's brief to this Court, in opposition to Commodities on application for certiorari in Case No. 163 stated at page 6:

"(2) Comparison with the net price for whole black pepper used in producing imitation black pepper similarly has no place here, for imitation black pepper is a different commodity from whole black pepper, and like whole black pepper, was subject to an OPA price ceiling. Imitation pepper was a new product, its production a new business, and hence the ceiling price fixed for it as a newly manufactured product was established on a different basis from those for products traded prior to the imposition of price controls. See Section 202 of the Emergency Price Control Act of 1942, 50 U. S. C. App. 922."

The answer to the above was obvious and simple. Commodities having proven the existence of a large market, and of dealings in synthetic or imitation pepper, and that O.P.A. had established a ceiling price therefor (Spec. Fdg. 18, R. 18-19), it must be assumed that Commodities had a right to engage in this business.

It was the duty of the Government to prove any obstructions or prohibitions if they existed. It was not the

uty of Commodities to prove a negative and show that here were no prohibitions. How would an American citizen go about proving that he could lawfully engage in new business?

In his brief upon this appeal, the Solicitor General has shifted his position somewhat and now says:

> "Imitation pepper was a new product, its production a new business, and hence the ceiling price fixed for it as a newly manufactured product was established on a different basis—cost of manufacture plus a fair profit—from those for products traded prior to the imposition of price controls. See Section 2 (a) of the Emergency Price Control Act of 1942, 50 U. S. C. App. 902 (a). Despite the 30-cents-per-pound price Commodities now says it could easily have secured by manufacturing imitation black pepper (Br. 6, 12, 40, 56), the record contains nothing to indicate that it was ever anything but a speculator or "investor" in pepper, or that it desired or was able to do this type of manufacturing, or what it would cost it to make the synthetic product. By its own admission, Commodities has never associated with the spice trade generally (Pet. 39); 'it was in no sense a regular commercial undertaking' (R. 52). Indeed, there is nothing to show that Commodities ever engaged in grinding pepper, or other spice processing of any kind, that it ever attempted or desired to enter this field, or that, in wartime, it could have secured the equipment or facilities necessary to have done so. This special ceiling price, then, was not in reality available to Commodities—as is proved by its own failure to take advantage of a very high price it now says it could easily have secured—and it is wholly irrelevant to the present proceeding" (Br. 111-112).

The above is equally fallacious. The synthetic business was available to Commodities. The fact that it had never engaged in anything but very large transactions in connection with the importing and selling of pepper, and that it had had no intention of becoming a regular dealer or of associating itself with the pepper trade prior to the War (Spec. Fdg. 5, R. 14, 25, 53) is no reason why when the Government prevented it from carrying on the business that it desired to carry on, it could not turn to a new business and employ its large inventory therein.

Commodities repeats that it was not for it to show it could engage in a new business in which others were engaging, but it was the Government's duty to prove to the contrary if it could produce any facts to sustain such a contention.

The suggestion that in Wartime it could not have secured the facilities or equipment necessary to grind its pepper is most far-fetched. The record shows that there was approximately 30,000,000 pounds of whole black pepper consumed in the United States annually (Spec. Fdg. 8, R. 15), but it was not consumed in that form. It was in most cases ground and the importers sell their pepper to grinders and packers (R. 128).

The complaint which brought about the attempt of the Government to seize all of plaintiff's pepper for civilian use was that the packers and grinders could not obtain the pepper to grind (R. 128-129).

There were, of course, ample facilities and there was no law against Commodities having its pepper ground for it by any one having the facilities. There was no obstacle to starting a new business such as might obtain in the ordinary case. Here was a case where there was a tremendous demand and none of the ordinary expenses of engaging in a new business such as advertising and creating a clientele would have been necessary. As stated by defendant's witness, Squires, Chief of Spice Section

of O.P.A., if any dealer could have sold ground pepper for 12¢ a pound legally a line would have formed in front of his place. He would not have had to look up any customers (R. 106).

While this had reference to the ceiling price of 12½¢ which O.P.A. maintained on ground black pepper, it shows how great was the demand.

The Solicitor General closes his argument as follows:

> "This special ceiling price thus was not in reality available to Commodities, as proof of its own failure to take advantage of the very high price it could easily have secured and it is wholly irrelevant to the present proceeding" (Br. 112).

The reason why Commodities did not take advantage of this is not shown. There are many possible reasons. Among them was the fact that pepper at that time was selling for $2.00 in uncontrolled markets (R. 72). Commodities knew that there would be a great scarcity at the end of the War and possibly considered that it could make far more by holding its pepper than by converting it into this synthetic mixture. The price at the end of the War was 50¢ to 60¢ but soon rose to 80¢ (Spec. Fdg. 17, R. 18, 40).

Moreover, Commodities would not have been in a desirable position if it had parted with its pepper at that time (the spring of 1944) even if it could have done so legally. It must be remembered that on March 13, 1944 a large quantity of Commodities' pepper was put under requisition by the War Food Board. While Commodities obtained an injunction prohibiting the removal of the pepper from the Warehouse it had only a temporary injunction and the Judgment of the United States District Court that the Second War Powers Act did not authorize the requisitioning of the pepper for Civilian consumption was not rendered until July, 1944. It would not have

been in a pleasant position if it had parted with its pepper under such circumstances and if the Court had upheld the Food Board. While the particular requisition which was enjoined included only 3,964,800 pounds of pepper, the papers in the case showed that it was the intention of the Government to requisition, and that requisition had been provided for, with respect to practically all of the whole black pepper in the hands of Commodities and all other importers (Affidavit of Olmstead, R. 130-131, *Commodities Trading Corp.* v. *Federal Surplus Commodities Corp., et al.*, U. S. D. C., for Dist. of Col. Civil Action No. 23573).

In view of the proof in the record and the finding of the Court of Claims, this Court must consider that there was no physical or legal obstacle to Commodities engaging in this business. This point is of the greatest importance in view of the concurring opinion in the *Felin* case, in which the Justices joining therein proposed the ceiling price as the measure of just compensation to *Felin* because he had no outlet at any higher price and had to sell.

Here, Commodities was in the favorable position of being able to hold its pepper until the end of price control and then selling or of converting it promptly into imitation pepper and taking advantage of an immediate outlet more than four times as high as the ceiling price.

The Solicitor-General states (Br. 112), that real ground pepper was closely analogous to whole black pepper and that the ceiling price on the ground pepper of 12½¢ supports the fairness of the 6½¢ price on whole black pepper.

The Government's trial counsel sought to show what the Solicitor General here states, but on cross-examination, Squires admitted that there would be no cost of sales, as a line would form in front of the premises of any dealer who had ground black pepper to sell at 12½¢ a pound (R. 106).

Moreover, as above stated, page 15, when the O.P.A. increased the price of pepper from 6½¢ to 10¢ it made no increase to the packers of pepper, as it stated that they were making sufficient profit to absorb the increase (Regulation 52, as amended October 9, 1944). The increase was approximately 60%, all of which they had to stand.

## TENTH POINT.

**The other opportunities to sell at far above the 6½ cent price destroy the force of that ceiling and furnish an additional measure of the value of Commodities pepper.**

The Solicitor General argues that because Commodities never sought to bring itself within the limited classes covered by other ceilings they are wholly inappropriate to measure just compensation for its pepper (Br. 110 *et. seq.*). This, Commodities submits, is an obvious *non sequitur*. Commodities did not wish to sell its pepper to anybody, but wished to hold its pepper until the turn of the cycle for high prices (R. 52-53, Spec. Fdg. 8, R. 15), but the fact that it had the right to bring itself within the classes referred to is of great importance in showing the price at which Commodities could have sold its pepper at the time of seizure in the United States if it had so desired, and this distinguishes this case completely from the *Felin* case.

Here, as already stated, Commodities did not have to sell and if it wished to sell it could have put its pepper out through channels where much higher prices prevailed than the 6½¢ price.

The exception from the general price ceiling of sales of less than one bag (O.P.A. Reg. 52) is a matter of importance with respect to the price at which Commodities' pepper could have been disposed of. It had the right to sell 125 pounds of pepper, or even slightly more, to any quali-

fied purchaser without coming under the prohibition of O.P.A. Regulation No. 52.

The Solicitor General says the right to sell this small quantity has no bearing on the requisition of 759,000 pounds (Br. 111). Commodities submits that the fact is just to the contrary. Hundreds of vessels left New York Harbor every week. These vessels furnished an outlet for tens of thousands of pounds per week, but dozens of other Ports were also clearing large numbers of vessels.

Moreover, these less than one bag lots were not limited to vessels and could have been sold to American National Red Cross and many other public or quasi-public agencies. The American Red Cross was supplying not only the Armed Forces, but the persons of devastated countries and had a great output of food stuffs, and F.D.O. 19 not only permitted Commodities to make deliveries in less than one bag lots directly to these people, but permitted it to deliver to any one "for replacing in his inventory any restricted spice so delivered or used", so that any grinder who had delivered to any of the Governmental Agencies, or who had delivered to the Army, Navy, Marine Corps, Coast Guard, War Shipping Administration, or any of the other Governmental Agencies mentioned, or to the Red Cross, or to Steamships, could replenish his inventory by purchasing from Commodities, and if these purchases were in less than one bag lots, say 125 pounds (see Commodities Main Brief 43-44), they would be free from the O.P.A. 6½¢ ceiling price.

The Solicitor General argues that the cost of making these sales would eat up the difference in ceiling price (pp. 112-113). There is nothing whatever to this argument. At a time when people wanted pepper and where unrestricted by their governments, were paying $2. a pound for it (R. 62), no advertising or sales expense would be necessary to sell any amount within reason at 20 cents (R. 106).

## ELEVENTH POINT.

**Commodities Pepper had a retention value in excess of 22¢ a pound which should have been allowed in finding just compensation.**

The Solicitor-General does not answer, or even attempt to answer directly the facts and arguments made by Commodities on this subject, in its main brief (pp. 35 to 41), but makes the general statement that the course of prices, once the market is free, "lies in the domain of inspired prophesy, rather than of fact-oriented judgment General experience with economic forecast, and especially in a period of great flux, does not justify an attempt by the Courts required to make evaluations as of the midst of the war to foretell market or business conditions several years in the future" (Gov. Br., 68-69).

Where there is no current market, value is always an estimate based on provable facts, "Retention" value is no exception, Commodities has proved the facts. As pointed out in Commodities' main brief, pages 35 to 41, the factors which in some cases may lie "in the domain of inspired prophesy" were, in the case at bar, founded upon definite and immutable facts.

The following is not prophecy inspired or otherwise: The price of pepper dropped from 42¢ to 3¢ in a few years with no substantial recovery. Because of this the natives planted no new pepper vines for the five years immediately preceding the war and allowed established gardens to be swallowed up by the jungle (R. 101-102). As it takes the pepper vine seven years to reach its normal bearing capacity, and four years to yield any crop at all ,it is obvious that even if the natives had changed their attitude immediately upon the Japanese invasion, and had started to plant pepper in 1942, those vines would have produced no pepper prior to 1946 and little pepper prior to 1949 (R. 99-102).

All of the foregoing statements of this paragraph are acts, facts which were all known before the War, and immutable.

Moreover, the heavy production in 1935, 36, 37 and 38, which beat the price down to the unprecedented low of 3 cents a pound from the unprecedented high of 42 cents in 1928 and 1929, was due to the heavy plantings in 1926, 27 and 28 indulged in by the Sumatra natives inspired by the high prices of those years. But the evidence was clear, and the Court of Claims found that the pepper vine did not continue to bear beyond fifteen years after the date of planting (Spec. Fdg. 26, R. 22, 43, 66-68, 101-102). Of course, this ceasing to bear does not happen suddenly, but is a tapering off, so that by 1942 most of the 1926-1928 heavy planting had ceased to produce and production was down 40% (R. 100). By 1944 all of it would have ceased.

None of the above is "inspired prophesy" but was an immutable fact, so that even had there been no war, there would have been a scarcity (Fdg. R. 43, 66-68, 101-102).

Added to the above, was the further fact of great Japanese destruction (R. 45, 102).

Here, again, we have no prophesy, but a definite actual fact. This made it doubly certain that there would be a dearth of pepper in the world for at least seven years after the Japanese invasion (R. 102) up to which time it was known that there had been no new plantings since 1936 (R. 101-102).

The world shortage which has actually occurred and has kept prices in the neighborhood of $1.00 a pound was inevitable in 1944.

Prices, of course, result from supply and demand. The supply was short in 1944 and was bound to remain so until 1949. Moreover the proof was clear that the demand would be there. Pepper has been used all over the civilized world for more than three thousand years. The demand is not affected by the price. This is due to the

fact that there is no substitute and that the use is so small (one-eighth of a pound per year per person) (R. 50), that price is a matter of no consequence to anyone who wishes to use the condiment (R. 50).

With a definite shortage of supply and a definite demand (R. 45, 89, 68), there was no element of prophesy in 1944 in stating that the price would be high at the end of control. The only element of prophesy lay in how high. A crop failure for one year in 1926 sent the price to above 42 cents and kept it at an average price far above 30 cents for three or four years (see Fdgs. 9 and 26, R. 16 and 22). For seventy-five years every time there has been a shortage pepper has risen to 20¢ or more (Fdgs. 9 and 26).

Commodities submits that there was no element of "inspired prophesy" in the prediction by any one familiar with the pepper market and pepper conditions that the prices following decontrol would be in excess of 22 cents per pound. A price far in excess of 30¢ was the unanimous prediction of the spice trade (Spec. Fdg. 16, R. 18). A price of 50¢ to 60¢ actually followed decontrol (Fdg. 17, R. 18) with an 80¢ price soon after* (R. 40).

The Solicitor-General misinterprets "retention value". If there is an actual fair market at the time of taking that is the measure of value. Retention value does not exist except in those cases where there is no fair market. It is usually invoked where such market does not exist by reason of governmental interference. Then the Courts properly take into account the value of the property, less the depressing effects of governmental restrictions and where

*Note—While the course of pepper prices which actually followed decontrol may be said to be hindsight, hindsight may properly be resorted to in cases of condemnation. Orgel on Valuation under Eminent Domain, page 88; *City of Los Angeles* v. *Pomeroy*, 124 Cal. 507; *Tyson Creek* v. *Empire*, 31 Idaho, 580; *Matter of Board of Water Supply*, 209 A. D. 213 (N. Y.). *In the Matter of the People of New York, etc.*, 81 Misc. 324 (N. Y.). Moreover, the right to judge a claim by what has actually happened is the stronger in a case like the one at bar, where the Government insists that there are no definite rules to go by and that simple equity is the only guide.

there is a world market, a world shortage and an ability in the owner to hold until decontrol this retention value is very real and important.

The inclusion of "retention value" is not unfair to the public or other traders. The excess over the ceiling price added by such "retention value" would not normally be an anticipated increment due to a war caused postwar inflationary rise. On the contrary, under the Emergency Price Control Law, ceiling prices did not end with the war, but were continued until there was a reasonable adjustment of prices. Ordinarily, the postwar price would be the prewar price, plus such increases in labor and other costs which had taken place during the war, or as a result thereof.

Retention value is that value, remaining after the depressing effect of Government restrictions have been taken out. Such value adheres to the property because such restrictions are but temporary and the future high market is certain and the property does not depreciate.

The Government claims that retention value is too speculative (Br. 68). It says, quite correctly, that just compensation is to be determined by value at the time of taking. This, Commodities has always conceded, and this the Court of Claims fully recognized. Otherwise, it would have allowed 50¢ and not 15¢ as retention value for Commodities pepper. In most cases retention value is speculative. It is speculative in this case to a limited extent. That is, no one knew in 1944 that the price of pepper would be 80¢ a pound in 1947 (R. 40). and that it would be in the neighborhood of $1.00 a pound four years following the end of price control. Commodities has claimed no such amount as just compensation. What it has claimed is only the amount that could reasonably have been foreseen as the minimum price.

The Court of Claims has taken into account in fixing retention value even the matter of possible obsolescence.

*Kaiser* v. *United States*, 69 F. Supp. 588;
*Pantex Pressing Machine Co.* v. *United States*,
71 F. Supp. 859.

In the case of pepper, however, it has been an article desired by epicures for more than three thousand years. There was no chance in 1944 that the demand for pepper, which extends to nearly every part of the civilized world, would cease or slacken.

As already shown in our main brief (p. 56), the consumption is so small, only ⅛th of a pound per person per annum, that it makes little difference to the ordinary individual whether the price be 6¢ or 60¢ per pound.

On the other hand, it was equally certain that at the end of price control there would be an insufficient supply to meet the normal demand. Thus, in May, 1944 it was plain to every one that the world, except India and Sumatra, had been swept clean of pepper (R. 44-45). Prices as high as $2 per pound for a commodity which usually sells for from 12¢ to 25¢ a pound constitute proof of an extreme scarcity (R. 62, 79).

The low prices which had prevailed for six or seven years preceding our entry into the World War had put a stop to new plantings in the producing countries and had even led to the abandonment of established gardens (see Point IX, main brief).

With the facts established that there would be a great demand and that the supply would be much less than normal, high prices were an inevitable consequence. The chart of prices for 75 years back, found by the Court of Claims in its Ninth Finding (R. 15-16), showed that every time there had been a shortage of pepper, prices rose rapidly and rose to prices usually substantially in excess of 20¢ a pound

Besides these facts, which were definite and clear, was the fact that the entire Spice Trade believed that the O.P.A. ceiling price was unfair and would result in prices

much higher than 30¢ per pound at the time of decontrol (Spec. Fdg. 16, R. 18, 114). This was no "inspired prophecy", but the unanimous opinion of the persons having the best information on the subject.

On the other hand, as shown in Commodities main brief (p. 57), the cost of carrying the pepper was small and the end of the War was in sight, so that it would not be necessary to make a large deduction from the 30¢-plus price to ascertain what Commodities could obtain net by carrying their pepper to the end of price control.

## TWELFTH POINT.

**Commodities' sales at 10 cents, subsequent to October, 1944, and its negotiations to sell to the Army for 9¾ cents were not relevant, and should not be considered in determining the value of Commodities' Pepper in May 1944.**

At page 108 of its Brief, the Government refers to these "domestic sales at 10 cents a pound" and Commodities' offer to sell a million pounds of pepper to the War Department at 9¾ cents a pound, and states that they indicate "that Commodities own contemporaneous valuation of the pepper was substantially lower than the amount fixed by the Court of Claims."

There is no support for that statement and it is completely refuted by the proven facts.

Commodities did offer to sell to the Army a million pounds of pepper for 9¾ cents a pound.

While this letter was largely a patriotic action on the part of Commodities, it was not wholly so, and it was not a voluntary offer on the part of Commodities. It was really the acceptance of the offer of the Army to purchase at that price and was couched in that language to comply with Army formalities and to avoid violating the O.P.A. Regulations (Spec. Fdg. 22, R. 21).

Moreover, Commodities knew that if it did not sell to the Army at an agreed price, approved by O.P.A., its property would be requisitioned, it would be paid 3¼ cents and it would have the right to fight in the Courts, perhaps for years, to get any more thn that, with the knowledge that O.P.A. was insisting upon the maintenance of its 6½ cent ceiling price as payment in all cases. Besides this was seven months prior to the requisition in question.

With respect to the heavy sales at 10 cents, they do not indicate sales by a willing seller or Commodities' "contemporaneous valuation of its pepper", they indicate that Commodities was in a highly dangerous position, knew it, and was willing to make a compromise. Also that it sought to avoid the odium which the O.P.A. was casting upon it.

The situation in October 1944 was as follows:

Colonel Olmstead, Deputy Director of the Office of Distribution of the War Food Administration in the United States Department of Agriculture, and Chairman of the Inter-Agency Food Procurement Committee, having charge of the procurements of foodstuffs, had reported that 22 million pounds of Whole Black Pepper was essential to the defense of the United States, and that such amount be requisitioned in short order (R. 130-131).

In carrying out that program, 3,964,800 pounds of Commodities' pepper had actually been requisitioned on March 13th, 1944 (R. 126). While Commodities obtained a temporary injunction and had defeated the Government's motion for summary judgment made on the ground that there was no issue of fact between the parties, and that the requisition was authorized by law, the United States District Court for the District of Columbia, having held in July, 1944, that the Second War Powers Act did not authorize any such procedure on the part of the Government as the requistioning of pepper for civilian consumption.

Nevertheless, this was only a temporary injunction and a decision of the District Court (*Commodities Trading Corp.* v. *Federal Surplus Commodities Corp.*, Civil Action No. 23573, U. S. D. C. D. C.).

It was Wartime, and Commodities' case was one of the very few in which a Government requisition had been enjoined. Commodities was in the position where 16 million pounds of its pepper might have been taken by the Government and payment therefor made at the rate of 3¼ cents per pound at best, and at no payment if the practice followed in the case at bar had been adhered to, where nothing was paid until eighteen months after requisition (Spec. Fdg. 7, R. 15).

It would then have faced the bank with a claim against the government instead of with valid collateral for a loan and would have had a claim of such magnitude that any Court would have been astute to apply the strictest measures of compensation, with a long fight and a doubtful right of appeal to this Court ahead of it.

Of course, Commodities could not agree to sell and could not sell millions of pounds of its pepper with the requisition hanging over it and as it is an official matter, within the knowledge of the Government, it may be proper for Commodities to state here that as a part of this transaction the requisition was withdrawn and the injunction suit discontinued, which relieved Commodities from the threat of the taking of the rest of its pepper.

Commodities obviously was willing to sacrifice a part of its holdings at an inadequate price, in order to improve its chances of holding the balance until decontrol, and getting the high price which it knew would obtain at that time. However, as the Government itself points out, these sales took place five months after the requisitioning here in question, and should not be considered as relevant.

## THIRTEENTH POINT.

**Findings of the Court of Claims support an award far in excess of the 15 cents per pound allowed and in excess of the 22 cents per pound demanded in the complaint.**

The findings of the Court of Claims in its 9th Finding, taken in connection with its 26th Finding, show that the price of pepper would have been in excess of 20 cents a pound in May 1944, had there been no War.

Thus, the 9th Finding shows by a graph the great variations in price which had taken place over the last 75 years. The 26th Finding explains the reasons for these variations and shows that:

> "The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines. The 1926 Lampong crop was the smallest in history, with the result that prices reached the highest levels ever recorded; this greatly stimulated planting, leading to a period of very low prices some five years later. This in turn reduced plantings. The consequent reduction in crop was first noticeable, so far as its effect on prices was concerned, in 1937, 1938, and 1939, and by 1941 had had sufficient effect in raising prices so that new plantings might have been made in 1942. If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States" (R. 22-23).

The prices for pepper found in the 9th Finding were lower than any shown on the chart except 1936-1940. Consequently, it is fair to assume that the effect of these prices on failure to plant and neglect of gardens was at least equal to what had taken place in the past, and that the effect on increasing prices would be the same. That this was the intention of the Court is plain from its opinion, which states:

> "When prices are high the natives plant pepper; but when prices decline, they neglect their vines and allow them to be destroyed by the encroachment of the jungle. The resulting scarcity causes the market to rise. Prices stay high for several years because it takes about 4 years for a pepper vine to bear.
>
> "Commodities Trading Corporation bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must inevitably come" (R. 26).

While the Court finds no figures, it is fair to assume from the above that it meant to find that history would repeat itself and a rise, similar to that which had taken place in the past, would follow 1941. If that had happened, the price would have risen to 20 or 25 cents by 1944 (see chart). Commodities submits that the above subordinate findings require an allowance for just compensation of 20¢ or more.

The evidence was much stronger than the Finding. It showed an absolute cessation of planting for five years prior to the War and neglect of pepper gardens, which permitted the over-running of many by the jungle, with a consequent reduction in production of 40 per cent. This evidence was all undisputed, and the Court of Claims failed

to find the same. Error is assigned to each of such failures.

The comments of the Government's counsel (Br. 96-98) on the fact that the cycle of return to high prices from low had not taken place as rapidly in the cycle beginning shortly before the War as in preceding cycles is entirely irrelevant. Of course a drop from 42¢ to 3¢, the greatest in history, would naturally take longer than a drop from 25¢ to 6¢, as was more common, but by the same token, when the rise started, it went quickly, and if the next ceiling price after 1941, assuming there had been no War was to be 40¢, it would probably have reached that point by 1945.

The Government says (Br. 97) that Commodities made the mistake of beginning its operations too soon in 1933 when it should have waited until 1938 or 1939. A wise investor does not try to hit the very bottom. When prices are low enough he begins to buy. Commodities could not possibly have accumulated 25,000,000 pounds of pepper for the price it paid if it had waited for the bottom to begin its purchasing.

However that may be, the fact that there had to be a rise in prices from those of 1941 and quickly was as plain and immutable as the multiplication table. There was bound to come a period not much later than 1942 when for a stretch of five or six years there would be practically no pepper production. With this fact, there was bound to be a high price.

If this Court should feel that the findings of the Court of Claims are insufficient on this point, it should not make a judgment in the face of the undisputed facts shown by the record, but should require additional findings, or send the case back for another hearing.

The retention value of plaintiff's pepper sustains the 15 cent price and requires an allowance of the full 22 cents asked in the complaint.

Commodities is on somewhat firmer ground in this point. It has all of the advantage of what was shown and found with respect to what would have happened if there had been no War, but it had the added fact of the destruction caused by the Japanese and the findings of the Court of Claims that the Advisory Committee of the Spice Trade had predicted prices far in excess of 30 cents a pound if O.P.A. refused to let in the Indian pepper. O.P.A. did refuse and the price shot up to 50 cents to 60 cents per pound immediately after price control ceased and soon to 80 cents (Spec. Fdgs. 16 and 17, R. 18 and R. 26).

The opinion of the Court of Claims stated:

> "A very great increase in price was inevitable upon the removal of restrictions. The price of pepper had greatly declined in 1935 and 1936 and was still down when the ceiling price was fixed. This resulted in but little planting and in neglect of growing vines, which resulted in turn in a scarcity. In addition to this, the Japanese invasion of Indo China and Sumatra further reduced the supply. These factors made it inevitable that there would be a very great increase in the price after restrictions were removed" (R. 26).

This statement explained Findings 16 and 17 and shows that the Court there intended to find, for which it had ample evidence, that it was reasonably certain in May, 1944, that the prices following the War would be in excess of 30 cents per pound.

The cost of Commodities' pepper fully sustains the 15 cent price and would sustain a much higher price. The Court of Claims found a price of 12.7 cents, but in its findings and in enumerating the factors it considered, it

stated that it had excluded many factors that should have been included, and the finding showed on its face that allowances for many items were obviously much too low. The ajustment of these items would bring the cost well over 15 cents and the allowance of reasonable general overheads, which the Court of Claims did not allow at all, would bring the cost to at least 20 cents. This is discussed more fully in the Main Brief, p. 58, Point 12.

The market price of Indian pepper should have been taken as a fair measure of the value of Commodities' pepper, particularly in view of the fact that O.P.A. permitted the importation of large quantities of this pepper at prices of 23 cents or thereabouts as soon as Commodities had disposed of most of its pepper under its agreement with O.P.A.

Finally, the opportunity of Commodities to convert its pepper into synthetic or imitation pepper and sell it at a net price far in excess of 20 cents a pound (Spec. Fdg. 18, R. 18 and 19) fully sustains a price in excess of 22¢ (see discussion Main Brief, Seventh Point, and *supra*, pp. 48 to 54).

## CONCLUSION.

**The Court should direct judgment in accordance with the prayer of the complaint.**

Respectfully submitted,

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